In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1521

ANTHONY LOSCHIAVO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of bribery, in violation of 18 U.S.C. 201(b). He was sentenced to one year's imprisonment and fined $5,000. The court of appeals affirmed without opinion.[1]

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[1]Petitioner was acquitted on counts of conspiracy to defraud the United States and perjury. The jury was unable to reach a verdict on a third count, also charging perjury. A co-defendant, Andrew Storms, pleaded guilty before trial to the conspiracy count and was sentenced to four months' imprisonment. Another co-defendant, Kingdon DeWitt, pleaded guilty to a perjury count and was sentenced to six months' imprisonment. Two other co-conspirators, John Sanders and Pedro Morales, were charged separately with respect to the events resulting in petitioner's prosecution and with two other unrelated conspiracies to defraud the government. Both pleaded guilty. Sanders received a two year prison term; Morales, a government witness in several other prosecutions, has not yet been sentenced.

The evidence showed that in the fall of 1971, John Sanders, then the Acting Director of the Harlem-East Harlem Model Cities Program, directed Pedro Morales, his assistant, to inspect a building owned by petitioner as a possible site for storing Model Cities' sanitation equipment. After determining that the building was suitable, Morales and Sanders decided to ask petitioner for a $15,000 payment in return for entering into a lease on his building that would be profitable to him (Tr. 33-41). After several meetings between petitioner, Sanders, and Morales, petitioner agreed to the proposed illicit transaction and accordingly paid Morales $5,000 in November 1971. This money was delivered by co-defendant Storms, a contractor with whom petitioner had arranged to renovate the building at government expense, pursuant to the government lease (Tr. 41-49). The lease was not immediately forthcoming from Sanders' office, and in February 1972, petitioner personally gave Morales another $2,500 on learning that Storms had withheld that amount from $7,500 originally given him by petitioner for delivery to Morales and Sanders (Tr. 50-55). On May 9, 1972, a five year lease was executed at $108,400 per year, and renovations costing $257,000 were approved (Tr. 57, 62). Petitioner then transferred to Morales another $7,500 in cash (Tr. 63-64).

On September 1, 1972, Morales was arrested on an unrelated charge of conspiracy to defraud the United States involving the receipt of bribes in connection with a Model Cities summer camp program. He then agreed to cooperate in an undercover investigation of corruption within the Model Cities Administration (Tr. 66-68). He approached petitioner on September 26, carrying a concealed transmitter and tape recorder, and indicated that he had been

called before a federal grand jury and wanted to formulate his testimony so as not to incriminate anyone. Petitioner then reviewed the bribery transaction with him; this recorded conversation was played for the jury as corroboration of Morales' testimony (Tr. 70-82).

1. Petitioner first argues that the district court was without jurisdiction in his case because 18 U.S.C. 201 (b) allegedly applies only to the bribery of federal employees, whereas Sanders and Morales were employed by the New York Model Cities Administration. This position is not well taken. Section 201(a), in proscribing the bribery of a "public official," defines such official in part as "an officer or employee or *person acting for or on behalf of the United States,* or any department, agency or branch of Government thereof" (emphasis added). While Sanders and Morales were technically employed by the City of New York, the control and supervision exercised by the federal Department of Housing and Urban Development (HUD) over the city's Model Cities Administration was such that they were properly regarded below as persons "acting for or on behalf of the United States."

Under the Model Cities program, federal funds are distributed to qualified cities in accordance with a highly detailed budget approved by HUD. See 42 U.S.C. 3301, *et seq.* New York City was required to maintain records in accordance with HUD requirements, to document all costs of the program, to submit to regular audit and inspection by HUD of all its records, including contracts, invoices, payrolls and records of personnel, and to comply with HUD guidelines concerning conflict of interest, discrimination in employment and labor standards. HUD also issued guidelines to the Model Cities program concerning management capabilities of its employees, required the City to give preference in hiring to area residents

and to maintain a certain level of competence among Model Cities employees, and reserved the right to review the hiring of any individual and to comment on his performance. The federal government paid 100% of the costs of approved projects and activities of the program and 80% of the cost of administration. In the instant case HUD specifically authorized an expenditure of federal funds to cover the cost of a neighborhood cleanup program in the Harlem-East Harlem Model Cities area, including the rental of a sanitation facility; thus HUD funded all of the rental due petitioner and 80% of the salaries of Sanders and Morales. This pervasive involvement of the federal government in the Model Cities program of which Sanders and Morales were a part—though they were technically employed by New York City—supports petitioner's conviction of bribery of persons "acting for or on behalf of the United States."

The applicability of federal fraud statutes to local activities funded by the federal government has long been recognized. See, *e.g., United States ex rel. Marcus* v. *Hess,* 317 U.S. 537, where this Court held a statute proscribing the making of false claims for payment against the federal government applicable to certain individuals who had presented false claims to local municipalities funded under the federal Public Works Administration. See also *United States* v. *Candella,* 487 F. 2d 1223 (C.A. 2), where 18 U.S.C. 1001, which prohibits the making of false statements "in any matter within the jurisdiction of any department or agency of the United States * * * * " was held applicable to false claims for moving expenses under an urban renewal project because, although the claims were presented to the New York City government, the City received reimbursement from the federal government.

2. Petitioner also contends that the prosecution improperly elicited from Morales testimony that he had changed his residence because of threats directed towards his wife and daughters. This question, however, was asked by the government during redirect examination in order to clarify matters first brought out during petitioner's cross-examination of Morales. Petitioner had asked Morales if he was receiving subsistence payments from the govenment, to which he responded affirmatively (Tr. 126-127). On redirect examination, the prosecution merely elicited from Morales the explanation that due to threats to his family he was forced to move, thus causing his wife to resign her employment and necessitating government subsistence (Tr. 182-183). The jury was aware that Morales was involved in other government investigations (Tr. 183), and the prosecution did not attempt to suggest that petitioner had made these threats. Indeed, Morales testified that he did not believe petitioner was the source of the warnings (Tr. 172).

Similarly without merit is petitioner's related argument that the trial court erred in not permitting him to examine Morales further after the brief redirect examination.[2] The trial court determined, and the transcript reveals, that the information elicited on redirect examination was only clarification of facts discussed during cross-examination (Tr. 180-188). As this Court noted in *Alford* v. *United States*, 282 U.S. 687, 694, "[t]he extent of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial court. It may exercise a reasonable judgment in determining when the subject is exhausted." In the circumstances here, where

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[2]After the government's direct examination of Morales, petitioner cross-examined him for three hours (Tr. 86-180, 188).

cross examination had been extensive, the trial court's considered judgment that the matter was exhausted was reasonable.

3. Finally, petitioner argues that Morales' recording of their conversation constituted an illegal seizure. Recording of conversations with the consent of one of the parties, however, is as a legitimate investigative technique. See *United States* v. *White,* 401 U.S. 745; *On Lee* v. *United States* 343 U.S. 747; *Lopez* v. *United States,* 373 U.S. 427; 18 U.S.C. 2511 (2)(c) and (d). Similarly without merit is petitioner's claim of entrapment, for the bribery here had already taken place when Morales, newly recruited as a government informant, recorded the conversation in which petitioner reviewed his participation in the crime. See *United States* v. *Russell,* 411 U.S. 423.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1974.